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No. 92-973

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HARRIS COUNTY APPRAISAL DISTRICT, *et al.*,
Petitioners,

v.

TRANSAMERICA LEASING INC.,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Commerce Clause precludes a local Texas taxing authority from imposing an ad valorem property tax on domestically owned shipping containers used exclusively in foreign commerce, when the imposition of such property tax would create a substantial risk of international multiple taxation.*

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* Respondent Transamerica Leasing Inc., an indirect wholly owned subsidiary of Transamerica Corporation, is the corporate successor to Transamerica Container Leasing Inc. and has no nonwholly owned subsidiaries.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. *Background.* Respondent Transamerica Leasing Inc. ("Transamerica") brought this suit in the 80th Judicial District Court of Harris County, Texas, challenging the inclusion of certain of its shipping containers on petitioners' ad valorem tax appraisal rolls for 1987. Pet. App. 34a-35a. Transamerica is a corporation organized under the laws of Delaware and has its principal place of business in New York. *Id.* at 34a (the parties' stipulation incorrectly identifies New York as the state of incorporation). The shipping containers are instrumentalities of foreign commerce and are used exclusively

in such commerce. *Id.* at 36a. The containers were temporarily located in Texas on January 1, 1987, the relevant date for ad valorem property taxation under local law. *Id.* Petitioners are local Texas taxing authorities.

2. *Litigation in the district court.* The district court found that Transamerica's shipping containers are used to ship goods all over the world, that the containers can be subject to property taxation abroad, and that Texas law provides no relief from or protection against international multiple taxation. *Id.* at 16a. The court also found that although petitioners sought to tax Transamerica's containers, they did not tax similar containers owned by foreign domiciliaries. *Id.*

The district court concluded that petitioners' ad valorem taxation of Transamerica's shipping containers is barred by both the United States and Texas Constitutions. The court began its analysis with the Commerce Clause, art. I, § 8, cl. 3, of the United States Constitution.

The district court noted that, to be valid, state taxation of property used exclusively in foreign commerce must satisfy the requirements of both *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). Pet. App. 17a-18a. The court held that petitioners' tax on Transamerica's containers did not meet the test established by either case.

As to *Complete Auto*, the court held that the tax is not fairly related to services provided by the state: Transamerica's "shipping containers were only temporarily located within the boundaries of Harris County Appraisal District, and the value of any benefits [Transamerica] may have received from the State during these containers' temporary presence within the State is minimal and does not bear a reasonable relationship to the amount of tax imposed." *Id.* at 19a. The court further held that petitioners' "policy of deleting shipping containers used

in foreign commerce from the tax rolls if those containers are owned by foreign domiciled taxpayers, while refusing to delete such containers from the tax rolls when they are owned by domestically domiciled taxpayers, favors foreign corporations at the expense of domestic corporations, thus creating an unfair competitive advantage for foreign corporations and unduly burdening and discriminating against interstate commerce." *Id.* at 20a.

As to *Japan Line*, the district court concluded that petitioners' tax did not satisfy the requirement that "the tax, notwithstanding apportionment, must not create a substantial risk of international multiple taxation." *Id.* at 18a.

In addition, the district court held that the tax on Transamerica's containers also violates both the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution and the Due Course of Law, Equal Protection, and Equal and Uniform Clauses of the Texas Constitution. *Id.* at 21a-24a.

3. *Decision by the court of appeals.* The Court of Appeals for the First District of Texas affirmed. Because the court of appeals rested its decision on the *Japan Line* test, it determined that "no discussion of the *Complete Auto* test is warranted or necessary" and that the remaining federal and state constitutional issues "need not be addressed." *Id.* at 8a.

Petitioners' principal argument with respect to *Japan Line* was that the district court, although applying the correct test, had failed to state a finding that the risk of international multiple taxation was "substantial." The court of appeals rejected that argument, holding that under Tex.R.Civ.P. 298 and 299 such a finding was considered implicit in the district court's opinion read as a whole. *Id.* at 7a. The court further determined that this implicit finding of a substantial risk of multiple

international taxation was supported by the evidence: "[t]he judge had before him additional agreed facts from which he could have concluded the risk of multiple taxation was 'substantial,' including, but not limited to the findings that other countries could tax the containers and that no system was in place to protect Transamerica from such an event." *Id.* The court therefore agreed that "the taxation plan of [petitioners] does not withstand the *Japan Line* test." *Id.* at 8a.

The Texas Supreme Court denied petitioners' application for a writ of error, "having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals." *Id.* at 28a.

ARGUMENT

The decision of the Texas intermediate court of appeals in this case does not warrant review by this Court. The court of appeals faithfully followed Texas procedural law and this Court's decision in *Japan Line*; its ruling does not conflict with that of any state court of last resort or federal court of appeals; nor is there any other reason to grant review.

1. In *Japan Line*, this Court set forth the following test for determining the validity under the Commerce Clause of a tax on instrumentalities of foreign commerce:

> [A]n inquiry more elaborate than that mandated by *Complete Auto* is necessary when a State seeks to tax the instrumentalities of foreign, rather than of interstate, commerce. In addition to answering the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto*, a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and second, whether the tax prevents the Federal Government from "speaking with

> one voice when regulating commercial relations with foreign governments." If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.

441 U.S. at 451. The court of appeals faithfully applied this test. It struck down petitioners' ad valorem property tax on Transamerica's shipping containers because that tax creates a substantial risk of international multiple taxation. Pet. App. 5a-8a.

In *Japan Line*, as petitioners point out, Pet. 10, this Court had no occasion to apply the constitutional test announced therein to a tax, like petitioners', on domestically owned instrumentalities of foreign commerce. *See* 441 U.S. at 444 n.7. But that does not mean that this case implicates a completely different constitutional test. It means only that the *Japan Line* test must here be applied to different facts. That is what the lower courts in this case undertook to do. They understood that the crucial issue under *Japan Line* is not who owns the instrumentalities of foreign commerce that are being taxed but, rather, whether the tax creates a substantial risk of international multiple taxation. They determined that because petitioners' tax does create such a risk, it violates the Commerce Clause. Pet. App. 7a-8a; *id.* at 18a. That result is wholly consistent with *Japan Line*.

Petitioners appear to take issue with the finding that their tax poses a substantial risk of international multiple taxation, suggesting that there is only a "mere risk" and complaining that "there is no contention or finding that any other country taxes Transamerica's shipping containers." Pet. 10-11. But the adverse finding of substantial risk, which is supported by the record and rooted in Texas procedural law, *see* Pet. App. 6a-8a, is not subject to review or correction here.

In any event, petitioners have stipulated that Transamerica's containers can "be subjected to taxation in a number of . . . countries," that "these containers are at risk of international multiple taxation," and that there

is no "mechanism capable of ensuring that the [containers] would not be subject to international multiple taxation." *Id.* at 36a. This stipulation, which petitioners cannot here challenge, has ample basis. Transamerica leases its containers to shipping companies that transport them worldwide; during the course of their movements, these containers may be subject to tax either where those lessees are domicilaries or elsewhere. *See id.* at 36a-37a. Indeed, because the containers are leased to third parties rather than used by Transamerica, the "international custom under which the country of domicile may tax the full value of property located abroad," Pet. 11, actually increases the likelihood of burdensome multiple taxation. The substantial risk of international multiple taxation is manifest.

Like *Japan Line*, "[t]his case concerns foreign commerce. Even a slight overlapping of tax—a problem that might be deemed *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned." *Japan Line*, 441 U.S. at 456. Petitioners nonetheless suggest that in the wake of *Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983), such multiple international taxation no longer can be considered a matter of constitutional concern. *See* Pet. 11. But this Court took care to explain in *Container Corp.* that that case "involve[d] a tax on income rather than a tax on property" and that " '[t]he reasons for allocation to a single situs that often apply in the case of property taxation carry little force' in the case of income taxation." 463 U.S. at 188, quoting *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 445 (1980). The *Japan Line* test plainly retains its vitality in cases of property taxation, and petitioners' tax does not pass that test.

2. There is no conflict or any other reason why this Court should grant review of this case. Petitioners' principal claim, that the question presented "is important to the State of Texas and its local governmental units,"

Pet. 12, is refuted by the fact that the Texas Supreme Court itself denied review and, in doing so, specifically noted that the case presents no question of "importance to the jurisprudence of the State." Pet. App. 28a.

Nor is there any reason to accept petitioners' suggestion that the issue is important to other states. Petitioners furnish no evidence that this issue is being litigated elsewhere or even that any other state attempts to impose ad valorem property taxes on shipping containers or other instrumentalities of foreign commerce; certainly there is no evidence that any other state imposes such a tax without affording relief from or protection against multiple international taxation. Although petitioners insinuate that domestic owners of instrumentalities of foreign commerce "are likely to continue their challenges to similar taxes," Pet. 12, petitioners do not identify, and we are not aware of, any such challenges. This litigation appears to be unique. But, even if the issue were being widely litigated, which it is not, this case, with its observably skimpy record, would be an unsuitable vehicle for resolution of the issue on a nationwide basis. Furthermore, the issue itself is not ultimately dispositive even of this lawsuit: were review to be granted and petitioners to prevail, other issues of federal and Texas law, which the district court resolved in Transamerica's favor, *see* Pet. App. 21a-24a, would remain for consideration by the court of appeals. *See id.* at 8a.

Finally, we agree with petitioners that "[b]ecause of the differences between sales and property taxes," Pet. 11, this case will not be governed by this Court's forthcoming decision in *ITEL Containers International Corp. v. Cardwell*, 814 S.W.2d 29 (Tenn. 1991), *cert. granted*, 112 S.Ct. 1158 (1992) (No. 91-321). In *ITEL*, the Tennessee Supreme Court upheld a Tennessee "sales tax upon the transfer of possession in Tennessee of domestically-owned cargo containers used exclusively in international commerce." *Id.* at 30. The court reasoned that such a tax is like the taxes upheld in *Wardair Canada, Inc. v.*

Florida Dep't of Revenue, 477 U.S. 1 (1986), and *Department of Revenue v. Association of Washington Stevedoring Co.*, 435 U.S. 734 (1978), and, correspondingly, is unlike the tax struck down in *Japan Line*:

> Tennesee's sales tax on the transfer of possession of containers used to move goods in foreign commerce is more analogous to a sales tax on fuel used to move passengers in foreign commerce, and to an occupation tax on the activity of loading and unloading cargo in foreign commerce, than to the direct *ad valorem* property tax imposed by California on Japan Line's cargo containers.

ITEL, 814 S.W.2d at 35. It makes no difference here whether this Court agrees or disagrees with that conclusion, for this case, unlike *ITEL*, indisputably does involve precisely the same kind of *ad valorem* property tax as *Japan Line*. The validity of petitioners' tax therefore is to be determined, as the courts below properly held, in accordance with the *Japan Line* test. The lower courts correctly applied that test in this case, and there is no cause for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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